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No. (1)

In The
Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a minor, et al.,
Petitioners,

v.

MARTY EUVERARD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 13, 2008

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QUESTIONS PRESENTED FOR REVIEW

I. Whether *Tinker v. Des Moines Independent School District* and *Morse v. Frederick* permit school officials to punish a student for his viewpoint as long as the speech does not involve a matter of public concern.

II. Whether a high school student's permanent dismissal from a varsity athletic team, or other voluntary, extracurricular activity, in retaliation for the student's exercise of his free speech rights, is a sufficiently adverse action to establish a violation of 42 U.S.C. § 1983.

III. Whether school officials may dispense with *Tinker's* requirement that there be evidence of disruption and punish a student based upon his viewpoint.

IV. Whether the right of a high school student to engage in speech that criticizes an abusive high school coach was clearly established as of October 10, 2005.

LIST OF PARTIES TO THE PROCEEDING

Petitioners are Jeff Lowery, Lisa A. Lowery, Derrick "Rabbit" Lowery, Randy Giles, Jacob Giles, Stacey Guthrie, Joseph Dooley, James Spurlock, Lora Spurlock, and Dillon Spurlock.

Respondents are Marty Euverard, Dale Schneitman, Craig Kisabeth, and the Jefferson County Board of Education.

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INTRODUCTION

In the fall of 2005, four students from a public high school in rural east Tennessee signed a petition that was critical of the varsity football coach. Typed by one of the students on his home computer, the petition was based upon the coach's repeated acts of abusive and humiliating conduct toward the player's teammates. Within four days of the coach's learning of the petition, he permanently dismissed this player and three other supposed "ringleaders" from the team. Despite the express holding of *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 509 (1969) that a student's right to freedom of speech extends to "the playing field," the Sixth Circuit upheld the dismissal. In a decision that will have broad ramifications for any student who risks reprisal by speaking out against an abusive coach, teacher, or other school official, a divided panel of the Sixth Circuit held that the speech was unprotected because of the viewpoint expressed and because the punishment was merely dismissal from an extracurricular activity. In so doing, the Sixth Circuit emasculates *Tinker* and ignores the unconstitutional conditions doctrine, restricting the free speech rights of students to those few situations where a student is suspended or expelled for opining on a matter of public concern.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit upon which this Petition for Writ of Certiorari is filed is reprinted at App. 1a-50a and is published at 497 F.3d 584 (6th Cir. 2007). The order of the United States Court of Appeals for the Sixth

Circuit denying rehearing *en banc* is reprinted at App. 53a-54a and is not otherwise published. The order of the United States District Court for the Eastern District of Tennessee granting partial summary judgment in favor of Plaintiffs/Petitioners is reprinted at App. 51a-52a and is not otherwise published.

STATEMENT OF BASIS FOR JURISDICTION

The court of appeals entered its judgment on August 3, 2007. Petitioners timely filed a petition for rehearing *en banc* on August 17, 2007. (Appendix E). On February 1, 2008, the court of appeals issued its order denying Petitioners' petition for rehearing *en banc*. On April 16, 2008, Petitioners timely filed a request for extension of time in which to file a petition for certiorari. This request was granted on April 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this action are 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. (Appendix I).

JUDGMENT TO BE REVIEWED

Petitioners seek review by the Supreme Court of the judgment of the Sixth Circuit Court of Appeals, which reversed the judgment of the District Court and remanded for entry of summary judgment in favor of Respondents.

STATEMENT OF THE CASE

Petitioners are former high school students at Jefferson County High School ("JCHS"), and their parents.[1] Because it is the only public high school in this rural, east Tennessee county, JCHS is the only place to play high school football in the county. All four student-athletes were members of the varsity football team during the 2005 season. Prior to the incident in question, none of the boys had ever been disciplined by a coach, or suspended or expelled from school.

Six games into the season, Jacob Giles, a sophomore who started for the team, prepared a document on his home computer, which he called a "petition." The petition was the product of discussions between Giles, Joseph Dooley, Derrick Lowery, and other players about their dislike of the head coach, Marty Euverard, based upon his treatment of their present and former teammates. The following are some examples of Euverard's conduct, which led to the creation of the petition:

- Euverard used unnecessary force with players. For example, during a football practice in 2004, players witnessed Euverard delivering a hard, open-handed punch to the side of Kevin Cline's helmet, which violently jarred Cline's head. A teammate, Daniel Green, testified that "[i]n all

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[1] Although the parents of the four student-athletes are also parties to the petition, for the sake of brevity, the four student-athletes will be referred to as "Petitioners."

my experiences playing football, I never had seen a coach hit a player this hard."[2]

- Euverard threw away and directed others to throw away college recruiting letters to disfavored players. Athletic department secretary Annie Watkins testified that Euverard had told her to dispose of recruiting letters to Chad Williams.

- Euverard humiliated and degraded players in front of the entire football team. For example, Euverard told the football team that Michael Snapp made him "want to vomit" and was a disgrace to the football team, to Jefferson County, and to his family.

- Euverard implemented a mandatory year-round conditioning program, in violation of applicable high school rules, and punished players who missed these workouts.

The petition stated simply: "I hate Coach Euvard and I don't want to play for him." (Appendix F).

Giles intended to circulate the petition among players and former players, some of whom had quit the team because of Euverard's conduct. After these students had been given an opportunity to sign the petition, Giles intended to present it to the principal, Dale Schneitman, at the end of the season in the hope that Euverard would be replaced as the coach. In

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[2] These facts are documented in affidavits and deposition testimony contained in the record.

circulating the petition, Giles wanted players who felt as strongly as he did to have an opportunity to express their opinion to the school administration.

Starting on Monday, October 3, Giles approached Dooley about signing the petition, and Dooley did so. Giles and Dooley then approached a number of other players. Lowery, Spurlock, and many other players signed the petition. Among the players who signed the petition were the starting and backup quarterbacks. In three days, eighteen of the thirty-seven players on the football team signed it. Assistant coach Brimer, who has coached football at JCHS since 1976, testified that he has never had a situation where such a large percentage of players expressed their dissatisfaction with a coach.

Giles and Dooley circulated the petition before and after school, during breaks, and outside of football practice. This was done to prevent any disruption in school or on the field. Giles limited his distribution of the petition to current players and former members of the team who had quit. Four players who were approached about signing the petition declined. When those players told Giles that they did not want to sign the petition, Giles responded: "That's perfectly fine, I understand."

The circulation and signing of the petition did not cause any disruption to class or to football practices or games. There were no arguments between players concerning the petition. In fact, assistant coach Brimer testified that he did not have any evidence that the petition interfered with academic or football operations.

Although Giles' original intent was to offer every player the opportunity to sign the petition, he stopped circulating it on October 5 when he became concerned that the coaches might find out about it.

On Friday night, October 7, the JCHS football team played an away game. After JCHS lost the game, the football coaches met, and Euverard heard of the petition for the first time from assistant coach Upton. Upton had not seen the petition, but a player had told him about it. Upton said that the purpose of the petition was to get Euverard fired as head coach. According to Brimer, Euverard became upset and responded: "Well, I needed to know about it immediately." Brimer testified that, as an assistant coach, he would have wanted to know about the petition "early, as soon as possible" so that he could "take steps to eliminate the problem."

Subsequently, a special meeting was convened with the school administration the following Sunday to discuss the petition. The meeting lasted approximately eight hours and was limited to the petition and how to deal with it. During the meeting, Euverard was told by assistant coach Smoot that Giles, Dooley, and possibly Lowery, had started the petition. Despite the fact that the team had a losing record even before the petition was started, Euverard said that the petition was "tearing apart our team." Schneitman, a former coach, warned the coaches that petitions "destroy" football teams.

Euverard then laid out a plan. Instead of conducting practice the next day, he decided to interrogate each boy individually about the petition.

At the time, the Jefferson County School Board (the "Board") had adopted a policy concerning free speech which expressly permitted a student to "responsibly express himself/herself and to disseminate his/her views in writing." The policy cited *Tinker*. (Appendix G). However, there was no discussion about the players' rights under the policy. Though present, neither Schneitman nor the athletic director criticized, questioned, or countermanded Euverard's plan.

Euverard's plan was carried out, as scripted, the next day. Euverard interrogated each student, one by one, in a small office in the weight room, with no other persons present except Brimer. Euverard sat face-to-face, approximately three feet away from each student. During each interrogation, Euverard generally used the same questions, which he had devised, all relating to the petition: (1) Have you heard about the petition? (2) Did you sign it? and (3) Who asked you to sign it? If a student did not volunteer information responsive to the third question, he was asked directly whether Giles and Dooley had asked him to sign the petition. During the initial interrogation of players – before he came to Giles, Dooley, and Lowery – several players told Euverard that Giles and Dooley had advocated his dismissal as coach.

Both the players being interrogated and Euverard referred to the document at issue as a "petition." Euverard told players that the petition was hurting the football team, telling at least one player: "petitions and separations are an important reason for us being two and five." Euverard's demeanor was such that players felt that they would be dismissed from the team if they admitted to signing the petition. On the

first day of interrogations, only three players "admitted" to signing it. Those students were sent to the weight room to wait for Euverard. Later, Euverard told these three students to have their parents come to football practice the next day. All other players were sent back to the locker room to be with their teammates.

Euverard dismissed Giles, Dooley, and Lowery from the JCHS football team that same day, while the interrogations were being conducted. By that point, multiple players had informed Euverard that Giles and Dooley were the ringleaders in the circulation of the petition. Euverard had also been told on Sunday that Lowery might have been a leader in the circulation of the petition. The dismissal was permanent. As acknowledged by an assistant coach, this is the harshest punishment a football coach can levy upon a high school football player.

There is a factual dispute as to the basis for the dismissal of these three students, as the District Court found. Petitioners contend that it was because they were the "ringleaders" in the petition drive.

On October 11, Euverard continued his interrogation of players. Previously, a player had informed Euverard that Spurlock, another sophomore, had said he would be the "first to sign" the petition. When Brimer heard this information, he marked six asterisks by Spurlock's name in his notes and wrote, "Important – another name involved."

When Spurlock was called into the room for his interrogation, Euverard asked if he had been

approached concerning the petition. Spurlock answered, "yes." Next, Euverard asked Spurlock, "Did you sign the petition?" Spurlock told Euverard that he did. Then, Euverard asked Spurlock: "Do you still feel that way?" Spurlock answered: "I love football." According to Spurlock's testimony, Euverard interrupted him and said: "That's not what I'm asking. What I'm asking is do you want to play football for me as head coach?" Spurlock said, "no," but he also said, "I love football and I want to play for Jefferson County High School." Euverard again interrupted Spurlock and sent him to the weight room. Later, Euverard came to the weight room and told Spurlock and another player: "Get your stuff and go to the principal's office. You're not on the team anymore." At the hearing, Euverard admitted that Spurlock was never insubordinate.

Spurlock still wanted to play football, and he never told Euverard that he wanted to quit the team. Although he personally disliked Euverard, Spurlock had continued to play football for JCHS, giving "110 percent" effort, because he "love[d]" football. As Spurlock has testified, the petition states that he did not *want* to play for Euverard, not that he *would not* play for Euverard. Approximately one week later, Schneitman called Spurlock into his office and said he was "stupid" for signing the petition, he "shouldn't have signed it," the petition was the "wrong way" to express his opinions, and Schneitman and the football coaches "just don't like the whole mess."

At the earlier Sunday meeting, Respondents had agreed that dismissing players was "an acceptable price to pay" to fix what they believed was a team

lacking in unity. They discussed dismissing every single player who had signed the petition. However, neither Respondents nor the assistant coaches knew how many players had signed the petition because none of them had seen it.

During the Sunday meeting, Giles' father, Petitioner Randy Giles ("Mr. Giles"), spoke to Schneitman by phone and requested that Schneitman intervene to avoid a confrontational meeting between Euverard and the players. Schneitman flatly refused, saying, "Marty's got to get control of his team and there's got to be consequences for whoever is involved in this." That same night, Director of Schools Doug Moody told Lowery's mother, sarcastically, "You probably do not want to know my ideas on student petitions, do you?"

On the afternoon of October 10, after his son had been kicked off the team, Mr. Giles met with Schneitman, Moody, and the athletic director. Based upon his review of the names on the petition, Mr. Giles suggested that some of the boys had lied to Euverard about not signing it. When Schneitman mentioned dismissing those players from the team, Mr. Giles asked, "Well, if you do that, how are you going to play Friday?" Mr. Giles then showed Schneitman the petition, which contained eighteen names, not three. Mr. Giles also pointed out to Schneitman that both of the team's quarterbacks had signed the petition but lied to Euverard.

Through some means, by the next day Euverard had discovered that a significant number of boys had signed the petition but lied to him. After Euverard

interrogated the players who had been absent, Euverard re-interrogated a number of players he had previously questioned, including the two quarterbacks. The Board had adopted a policy which expressly stated that any student who answered falsely in an interrogation was subject to disciplinary action, including suspension. (Appendix H). Nevertheless, neither the two quarterbacks nor any other players who lied were disciplined in any way. Instead, Euverard "forgave" these players for signing the petition, after they apologized.

Procedural History

This action was filed in the United States District Court for the Eastern District of Tennessee on December 9, 2005. On June 23, 2006, Petitioners filed a motion for partial summary judgment limited solely to the question of whether the student speech was protected under the First Amendment. Thereafter, Respondents filed a motion to dismiss or for summary judgment based, in part, on qualified immunity. Petitioners also filed a motion for a preliminary injunction. After conducting a two-day hearing, which included testimony from Petitioners, Respondents, and other witnesses, the District Court found that there was a factual dispute regarding the basis for the student-athletes' dismissal, requiring a trial on the merits. Nevertheless, the District Court granted Petitioners' Motion for Partial Summary Judgment, finding that the petition and the statements made in connection with the petition were protected speech under *Tinker v. Des Moines Independent School*

District, 393 U.S. 503 (1969).[3] The District Court denied Respondents' Motion for Summary Judgment on qualified immunity, finding that the free speech rights of the players were clearly established. Respondents appealed based upon the denial of qualified immunity.

In a split decision, the Sixth Circuit reversed. In contrast to Judge Gilman, who wrote a separate opinion concurring in the result based solely upon qualified immunity, the panel found as a threshold matter that the speech of Petitioners was not protected by the First Amendment.

The panel began its analysis with a clip from the movie *Hoosiers*, where a high school basketball player is dismissed for telling his coach – in the middle of practice – "I'm getting tired of standing." Using the movie excerpt as the centerpiece of its opinion, the panel concluded that, despite there being no evidence that the petition caused a disruption, the student speech is unprotected.

Relying upon a snippet from a case involving the First Amendment rights of a government employee – a college coach – the Sixth Circuit first drew a distinction between the roles of the high school teacher and high school coach. Based upon the premise that in athletics "[e]xecution of the coach's will is paramount," the panel did not focus upon the free speech rights of students but upon the similarity between adult government employees and athletes. (App. 29a). The

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[3] The parties and the panel agree that the case is governed by *Tinker*.

panel found that such "greater restrictions on student athletes are analogous to the greater restrictions on government employees; thus, legal principles from the government employment context are relevant to the instant case." (App. 31a). There follows a detailed discussion of *Connick v. Myers*, 461 U.S. 138 (1983). Linking *Connick's* constitutional principles to the instant case, the panel concluded that, "[h]igh school football coaches, as well as government employers, have a need to maintain order and discipline," and permitting "attacks on their authority would effectively strip them of their ability to lead." (App. 34a). In the Sixth Circuit's view, "the key to understanding *Connick* and the instant case is that neither case is fundamentally about the right to express one's opinion, but rather the ability of the government to set restrictions on voluntary programs it administers." (App. 35a).

The Sixth Circuit acknowledged "the petition did not in fact disrupt the team." (App. 18a). Further, instead of demanding proof of anticipated disruption, the panel said that "abstract concepts like team morale and unity are not susceptible to quantifiable measurement, yet they undeniably have a large impact on team morale." (App. 22a). To support this proposition, the Sixth Circuit did not cite empirical studies; instead, the court cited ten sports writers and professional athletes. Concluding that the petition would necessarily undermine team unity, the panel concluded that a forecast of substantial disruption of the team was reasonable under *Tinker*.

As to the punishment meted out, the Sixth Circuit concluded that the coach could permanently dismiss

the four students from the team. The panel acknowledged that the coach could not suspend or expel the players, stressing that "Plaintiffs' ability to attend class has not been threatened." (App. 36a). Yet, without any discussion of *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the unconstitutional conditions doctrine, or the plethora of cases discussing the level of punishment necessary to "chill a person of ordinary firmness," the Sixth Circuit determined that permanent dismissal from this voluntary, extracurricular activity would not violate the First Amendment.

In what is better described as a dissent, Judge Gilman concurred based upon qualified immunity. Grounding his opinion upon express language in *Tinker* that a student's right to express his opinions applies "on the playing field," Judge Gilman opined that the student speech was entitled to constitutional protection.

REASONS FOR GRANTING THE WRIT

I. By Applying The "Public Concern" Test To This Student Speech Case, The Sixth Circuit's Opinion Conflicts With *Tinker* And The Authoritative Decisions Of Every Other United States Court Of Appeals That Has Addressed This Issue

The District Court and the Sixth Circuit agree that the free speech rights of Petitioners are governed by the standard established in *Tinker* and reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Tinker*, this Court reiterated that the "'vigilant protection of

constitutional freedoms is nowhere more vital than in the community of American schools.'" 393 U.S. at 512 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Holding that minors do not lose their constitutional right to freedom of speech by virtue of attending public school, the *Tinker* court expressly held that such freedom is not restricted to the "supervised and ordained discussion that takes place in the classroom." *Id.* at 512. The court said:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, **or on the playing field**, or on the campus during authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 512-13 (citations omitted) (emphasis added). Although the black armbands were worn by John Tinker and his little sister to protest the Vietnam conflict, this Court did not purport to limit the protections of the First Amendment to political, religious, or other matters which adults would consider grave or weighty. *Tinker*, 393 U.S. at 511 ("students are entitled to freedom of expression of their views").

Notwithstanding these principles, the Sixth Circuit has added to the *Tinker* analysis the "public concern" test applicable to government employees, dramatically

restricting the First Amendment protections afforded public school students. (App. 39a) (Gilman, J., concurring) ("[W]hat I find most troubling about the lead opinion's analysis is that it significantly alters First Amendment jurisprudence by grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983), onto the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue.").[4]

The requirement that the speech focus on matters of public concern is conspicuously absent from the three leading decisions of this Court addressing student speech since *Tinker*. *See Morse*, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986). As Judge Gilman observed,

> . . . the fact remains that government employees and high school athletes are not similarly situated, despite the lead opinion's analysis to the contrary. Whether we think that 'student athletes have greater similarities to government employees than the general student body,' Lead Op. at 12, is not determinative. What *is* determinative is that they are not similarly situated under existing case law. Furthermore,

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[4] The most compelling evidence that the panel has added a "public concern" test is its own acknowledgment that the coach could not dismiss a player for expressing unpopular "religious or political views" or for blowing the whistle on "improprieties." (App. 37a). Implicit in this statement is the acknowledgment that speech in these areas would be protected.

> the Supreme Court has specifically given us one test for students and another test for public employees.

(App. 40a-41a) (Gilman, J., concurring) (emphasis in original). Further, the panel's action is particularly inappropriate in that *Morse* had just been decided by this Court.

> Given the facts of *Morse*, the Supreme Court could well have chosen to add a public-concern requirement to the traditional *Tinker* analysis, but it did not do so. The school superintendent's administrative decision in *Morse* highlighted the fact that the student's speech was not political or espousing a religious viewpoint, but instead was "a fairly silly message promoting illegal drug usage in the midst of a school activity." (citations omitted). But the Court did not depend on this fact in its analysis. Nor did it undercut the force of *Tinker* in a way that has application to the facts of the present case. Justice Alito's concurrence suggests just the opposite.

(App. 42a) (Gilman, J., concurring).

The Sixth Circuit's opinion also puts this circuit at odds with all other courts which have considered the applicability of the 'public concern' test in the context of student speech. *See Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 766 (9th Cir. 2006); *Garcia v. S.U.N.Y. Health Servs. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001); *Seamons v. Snow*, 206 F.3d 1021, 1030, n.4 (10th Cir. 2000); *QVYJT v. Lin*, 953 F. Supp. 244,

248 (N.D. Ill. 1997). In a remarkably similar case, the district court in *Seamons* found that a coach's conduct was "reasonable under the circumstances" when viewed under *Connick's* "public concern" test. *Seamons v. Snow*, 15 F. Supp. 2d 1150, 1158 (D. Utah 1998), *rev'd* 206 F.3d 1021. Like the Sixth Circuit here, the trial court held that, just as a district attorney is allowed to fire an employee for disrupting harmony within the office, a high school coach can punish a player for expressing a view not shared by his teammates. *Id.* In reversing, the Tenth Circuit criticized the district court's "attempt[] to analogize the circumstances here to First Amendment cases involving public employees" in the face of "the well-established Supreme Court authority" on the standards applicable to student speech. *Seamons*, 206 F.3d at 1021, n.4. *See also Pinard*, 467 F.3d at 766 ("[N]either *Tinker* nor its progeny limited students' rights solely to the exercise of political speech or speech that touches on a matter of public concern."), *Garcia*, 280 F.3d at 106 ("public concern doctrine does not apply to student speech in the university setting").[5]

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[5] Even if the public concern test did exist in student speech cases, Petitioners' speech did touch on matters of public concern. The undisputed basis for the boys' starting the petition was their concern about repeated acts of physical violence, humiliation of players, and even intentional destruction of college recruiting letters. Where these incidents occurred during a school activity, supervised by school personnel, and funded with public dollars, these matters are unquestionably matters of public concern. *Cain v. Tigard-Tualatin Sch. Dist. 23J*, 262 F. Supp. 2d 1120, 1127 (D. Or. 2003) (allegations of abuse by coach toward players and covering up use of alcohol held to be matter of public concern).

Because the Sixth Circuit's decision runs counter to governing Supreme Court precedent and because there is now a split among the circuits, the petition should be granted.

II. This Court Should Grant The Petition To Settle An Important Question Of Federal Law On Which The Circuits Are Divided: Whether Permanent Dismissal From An Extracurricular Activity May Constitute An Adverse Action Under 42 U.S.C. § 1983 In A Student Speech Case

While the Sixth Circuit's decision erodes the First Amendment rights of all student-athletes to criticize an abusive coach, the most far-reaching effect is to alter fundamentally what constitutes an adverse action in *any* student speech case where the retaliation is anything short of suspension or expulsion from school. Joining the Eighth Circuit, and standing squarely against the Tenth, Ninth, and Second Circuits, as well as its own precedent, the Sixth Circuit held that the punishment was beyond challenge because "Plaintiff's ability to attend class has not been threatened." (App. 36a). This decision ignores one of the most basic principles of civil rights jurisprudence – that deprivations which are otherwise permissible cannot be imposed as punishment for the exercise of a constitutional right. Because this Court has never addressed the quantum of injury applicable in a student speech case and because there now is a clear split among the circuits, the petition should be granted.

Since at least 1972, it has been well-established that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (quoted in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)). The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on the basis that infringes his constitutionally protected . . . freedom of speech,' even if he has no entitlement to that benefit. *Umbehr*, 518 U.S. at 674 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). This principal has been routinely relied upon by the circuit courts over the last three decades. *See, e.g., Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998) ("act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper"). In addition, the uniform standard for evaluating the adverse action is whether the punishment "would deter a person of ordinary firmness from continuing to engage in that conduct." *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005). In this regard, the plaintiff's evidentiary burden is merely to establish "that the retaliatory acts amounted to more than a *de minimus* injury." *Bell v. Johnson*, 308 F.3d 594, 606 (6th Cir. 2002). *See also Thaddeus-X v. Blatter* (reversing Zatkoff, J.), 175 F.3d at 398 ("threshold is intended to weed out only inconsequential actions"). Since *Rutan*, it has been clear that retaliation as comparatively insignificant as not giving a birthday cake may be an adverse action under the First Amendment. *Rutan*, 497 U.S. at 75 n.8.

Struggling to force this student speech case into the mold of a government employee case, the Sixth Circuit ignores these fundamental principals. Acknowledging that the First Amendment protects the rights of students to criticize public officials, the Sixth Circuit says: "Likewise, plaintiffs had, and have, a right to express their opinions about Euverard." (App. 35a). Notwithstanding this correct conclusion about the students' rights under *Tinker*, the panel holds that dismissal from the team is acceptable because (a) high school football is a voluntary activity and (b) students have no general constitutional right to participate in a voluntary activity such as football. The panel states:

> Of course, the school could not, and did not suspend them for their opinions. Plaintiff's ability to attend class has not been threatened.

(App. 36a). Significantly, the Sixth Circuit concludes that a student may be permanently kicked off his high school athletic team without any discussion of the "unconstitutional conditions" doctrine, the *Rutan* standard, or its own cases which sift truly "inconsequential" punishments from those which are actionable under § 1983. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574 (1998) (misdirection of personal belongings); *Siggers-Dell v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005) (transfer of plaintiff from one prison to another).[6] Instead, the panel relies upon a similar

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[6] The panel even ignores precedent from its own circuit. *Henley v. Tullahoma City Sch. Sys.*, 84 Fed. Appx. 539, 540 (6th Cir. 2003) (finding that denial of opportunity to play high school basketball would be sufficiently adverse to "have the tendency to chill such speech").

analysis by the Eighth Circuit in *Wildman v. Marshalltown*, 249 F.3d 768, 772 (8th Cir. 2001).

In *Wildman*, the girl's basketball coach permanently dismissed a player from the team when the student would not apologize for writing an "insubordinate" letter to her teammates. While acknowledging this was humiliating to the student, the Eighth Circuit affirmed the punishment, saying:

> The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter.

249 F.3d at 772. Like the Sixth Circuit, the *Wildman* court did not even mention the unconstitutional conditions doctrine described in *Umbehr* or the minimal level of punishment necessary to establish a claim under *Rutan*. Neither of these circuits even asked the question whether permanent dismissal from an athletic team would chill an ordinary student from exercising his First Amendment rights.

As even Respondents acknowledge, the ultimate adverse action for an athlete is permanent dismissal from the high school team. That is particularly true where, as here, there is only one high school in the county and, therefore, only one opportunity to play high school football. As a Tennessee district court has stated, "Money damages simply cannot make up for the lost chance to play with one's classmates and the

thrill and excitement of competitive sports." *Crocker v. TSSAA*, 735 F. Supp. 753, 759 (M.D. Tenn. 1990). Indeed, for many high school students, permanent dismissal from the sports team, or the chorus, or the band, or the club would be more devastating than a temporary suspension from class. The threat of this lost opportunity would have a far greater chilling effect on their speech.

Therefore, in the view of the Sixth Circuit and the Eighth Circuit, had Jacob Giles – like Joseph Frederick – been suspended from school for expressing his opinions, he would have had a claim. However, because Giles was merely kicked off the football team, his constitutional rights are irrelevant.

In contrast, other courts have applied these broad principles to cases involving student speech. *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir. 1996); *Pinard*, 467 F.3d at 766; *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500-01 (4th Cir. 2005); *Cain*, 262 F. Supp. 2d at 1129-30. Most notable is *Pinard*, in which the Ninth Circuit expressly held that permanent suspension from the basketball team would lead ordinary student athletes to refrain from complaining about an abusive coach. 467 F.3d at 766.

To settle this disagreement among the circuits, this Court should grant the petition. Even more importantly, the petition should be granted because this Court has never considered in a student speech case whether a school official's removal of a student's opportunities for extracurricular activities is actionable. Heretofore, the punishment in these cases has always involved some restriction on the student's

"regular education." *Morse*, 127 S. Ct. 2618; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503. Because extracurricular activities are so important to students and because the threat of permanently losing such opportunities is so significant, the issue warrants review.

III. The Petition Should Be Granted Because The Sixth Circuit Grounded Its Decision Solely Upon Petitioners' Viewpoint, Dispensing With *Tinker's* Requirement That There Be Evidence Of Disruption

By permitting the punishment of Petitioners based upon their viewpoint without any evidence of disruption, the decision conflicts with the bedrock free speech principle, as made applicable to students in *Tinker* and *Morse*, that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Further, the Sixth Circuit has exacerbated the consequences of such viewpoint discrimination by dispensing with *Tinker's* requirement that school officials bring forth actual evidence of "substantial disruption." Based upon this two-fold deviation from the clear mandates of *Tinker* and *Morse*, the petition should be granted.

A. The Sixth Circuit's decision is improperly based upon Petitioners' viewpoint.

It is evident that the decision conflicts with multiple decisions of this Court which prohibit discrimination against a speaker based upon his

viewpoint. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). As this Court stressed in *Street v. New York*, where contemptuous words were applied to the flag, such speech is protected by the "constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order.'" 394 U.S. 576, 593 (1969) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). This Court has repeatedly reaffirmed this fundamental principal. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.") As a result, except in cases involving commercial speech, this Court has sustained such restrictions "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

In *Tinker*, the Court expressly applied this standard to the speech of high school students. In fact, one of the two "cardinal First Amendment principles animat[ing] both the Court's opinion in *Tinker* and Justice Harlan's dissent" is that ". . . censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> Discrimination against speech because of its message is presumed to be unconstitutional . . . . When the government targets not subject

> matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. (citation omitted).

Morse v. Frederick, 127 S. Ct. at 2644 (Stevens, J., dissenting).

Here, it cannot reasonably be disputed that the school administration targeted the speech of Petitioners because of their viewpoint. The record establishes that, upon learning that a petition was being circulated to have him fired as head football coach, Euverard "became upset, and decided to "smoke out" the culprits and dismiss them from the team." (App. 44a) (Gilman, J., concurring). He implemented this plan by interrogating each player individually and asking him three questions, all related to the petition. Euverard told players that the petition was hurting the football team and told at least one player that "petitions and separations are an important reason for us being two and five." The principal, himself a former coach, told Spurlock that he was "stupid" for signing the petition and that he "shouldn't have signed it." The principal even told Mr. Giles, the night before the boys were dismissed, that there had to be "consequences" for the petition.

Indisputably, the *viewpoint* was being targeted. One need only ask, had the petition been in support of

the coach – to give him a raise, for example, would Euverard have set up an elaborate process to ferret out the instigators. It is also demonstrated by the treatment of Spurlock, who was dismissed after signing it but never engaged in any conduct that could be categorized as insubordinate.

The panel acknowledges that Petitioners had raised the issue of viewpoint discrimination and candidly admits that it is considering the "content" as well as the context of the speech in validating the punishment. (App. 10a). Yet, without citing a single case discussing viewpoint censorship or the "most extraordinary circumstances" which would justify such censorship, the panel brushes the argument aside, saying:

> Plaintiffs suggest that the issue is whether it is permissible for school officials to engage in viewpoint discrimination against student athletes. However, this formulation is overly abstract, and also misleading.

(App. 12a).

Further, without anything except opinions of sportswriters and professional athletes to support its conclusions, the Sixth Circuit identifies two problems with the petition, both of which relate to content. The petition "undermined his ability to lead the team" and "threatened team unity." (App. 24a). The conclusion itself is flawed. Given the fact that more than half of the team signed the petition and only four refused, a reasonable conclusion is that Euverard had already lost the ability to lead the team and that the players were unified – against him. Irrespective of this *non*

sequitur, this conclusion demonstrates the panel's own disapproval of Petitioner's message, a normative decision that coaches should not be questioned. Under the Sixth Circuit's analysis, a student-athlete could apparently circulate a petition that was complimentary of a coach because this would strengthen the coach's ability to lead and would promote team unity. But critics – however justified in their hatred of a coach – could not. Such blatant viewpoint discrimination is inconsistent with the long line of cases since *Barnette*, and it guts *Tinker*.

B. Joining the Eighth Circuit, the Sixth Circuit dispensed with *Tinker's* requirement that there be evidence of substantial and material interference with the operation of the school.

In *Tinker*, the Court addressed the district court's conclusion that the school officials' action "was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands." The Court stated:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk,...

Tinker, 393 U.S. 508-09 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)). *See also Texas v. Johnson*, 491 U.S. at 409 (holding that "[o]ur precedents do not countenance. . . a presumption" that government may prohibit speech on the basis that "an audience takes serious offense at particular expression"). Therefore, as the Third Circuit has held, the "substantial disruption" standard in *Tinker* mandates "a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J).

Under *Tinker*, the burden of demonstrating facts showing an actual or reasonable forecast of a substantial disruption rests with the school officials. 393 U.S. at 508. The Sixth Circuit erred in its analysis, first, by shifting this burden to the Petitioners. (App. 43a-44a) (Gilman, J., concurring) ("[The lead opinion] gives lip service to the correct standard under *Tinker* – that the forecast of substantial disruption be reasonable – but then fails to apply the standard correctly. Instead, it improperly places the burden on the students to prove that there would not have been a disruption.").

Secondly, the Sixth Circuit did not consider whether the speech of the students interfered with appropriate discipline "in the operation of the school," assuming that speech which allegedly disrupts "team unity" alone is unprotected under *Tinker*. ("Defendants must show that it was reasonable for them to forecast that the petition would disrupt *the team.*") (App. 21a) (emphasis added).

Third, the panel erred by relying upon speculation of disruption. (App. 44a) (Gilman, J., concurring) ("generalized fear of disruption to team unity ... not enough to meet the 'substantial disruption' standard of *Tinker*"). Notably, the Sixth Circuit appears to acknowledge that "the petition did not in fact disrupt the team." (App. 18a). Moreover, the panel does not offer any specific examples of how the speech at issue *substantially* disrupted or could have *substantially* disrupted school operations. Giles and Dooley circulated the petition over the course of three days without incident. Respondents acknowledge that the boys did not circulate the petition during class, team meetings, practice, or games. The boys did not boycott, or threaten to boycott, practices or games. There is no evidence that they refused to execute a single football play. At the time of the interrogations, the petition had existed for a week, and no disruption whatsoever had been caused. Neither Euverard nor the other school officials had ever seen the petition and did not know whether two, twenty-two, or all thirty-seven players had signed it. In fact, one assistant coach testified that he did not have any evidence that the petition interfered with academic or football operations at all.

Moreover, the boys provided unrebutted testimony that they continued to give one hundred percent effort. Petitioners testified that they played for themselves and their teammates, despite their personal feelings about Euverard. There is no evidence in the record that the speech was disruptive of school operations at all, a crucial undisputed fact which the Sixth Circuit ignores entirely. In so doing, the panel relieves Respondents of their burden under *Tinker* of coming forth with actual evidence, such as past arguments

between players or players boycotting practice.[7] If any disruption was caused *later*, it was the fault of a paranoid coach, who was willing to sacrifice students as necessary. (App. 44a) (Gilman, J., concurring) ("[A] review of the record shows that there was no possibility of disruption or interference, nor did the players intend that there be one, until Euverard found out about the petition, became upset, and decided to 'smoke out' the culprits and dismiss them from the team.").

The Sixth Circuit misconstrues Petitioners' argument. Petitioners do not argue that *Tinker* requires an actual disruption of school operations before a school official takes measured, appropriate action. Instead, Petitioners argue that these facts – demonstrating no disruption at all – existed at the time Euverard punished the supposed "ringleaders," and these facts undercut any reasonable prediction of a disturbance. In contrast to situations where past evidence of disruption justified a reasonable prediction of future problems, there is no evidence in the record that petitions at JCHS had ever caused a disturbance. Given the dearth of evidence, it would have simply been unreasonable to forecast either a "material" or a "substantial" disruption. (App. 44a-45a) (Gilman, J., concurring). At the very least, these facts demonstrate that there is an issue of triable fact relating to the

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[7] By contrast, *see Pinard*, where the players refused to participate in a basketball game and *Wildman*, where the player advocated a "giv[ing] him [the coach] back some of the bullshit that he has given us." *Pinard*, 467 F.3d at 768-69, *Wildman*, 249 F.3d at 770.

reasonableness of a forecast of material and substantial disruption.[8]

The Sixth Circuit's decision also replaces the high hurdle of "material and substantial" disruption of school operations with the low hurdle of "team unity." As Judge Gilman notes, "[v]ague notions of 'teamwork' and 'unity' are simply not compelling school interests in the way that prevention of drug use is." (App. 42a). Quashing dissent can always be justified with appeals to the need for "unity," and calls for national unity or school unity could have been used to prohibit the students in *Tinker* from expressing their views. But that simply is not the line which this Court has drawn.

Further, the Sixth Circuit's decision allows school officials to define an "educational mission" to fit their own preferences – "team unity" – then use this amorphous term as a constitutional trump card to ban any speech that is contrary to the mission.[9] This analytical error is compounded by the panel's use of "common-sense conclusions" as a proxy for actual evidence. Instead of requiring proof of disruption, the

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[8] By failing to construe the facts in a light most favorable to Petitioners, the panel deviates from the standard to be applied on summary judgment in qualified immunity cases. *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007). A reasonable jury could find that the petition was cathartic, allowing the players to ignore Euverard, play for each other in spite of his outrageous treatment, and soldier on for the remainder of the season in hopes that the principal would replace Euverard at year end.

[9] Recently, the Supreme Court expressly rejected this argument for restricting student speech. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

panel relies upon a scene from *Hoosiers*, the opinions of sportswriters and professional athletes, and two hypothetical situations – a player giving a coach "lip" and a student making a "smart aleck" remark to a teacher.[10] Then, having set up these constitutional straw men, the panel tears them down through reliance upon supposed "common-sense" conclusions, citing a Supreme Court case unrelated to *student* speech.[11]

Ironically, the Sixth Circuit had recently rejected just such a flawed analysis in the area of commercial speech. *Pagan v. Fruchey*, 492 F.3d 766, 778 (6th Cir. 2007) (*en banc*) (refusing to permit a municipality to avoid its evidentiary burden of justifying the restriction on speech with "common-sense" assertions, stating, "[a] judicial pronouncement that an ordinance is consistent with common sense hardly establishes that it is so"). Thus, claims of common sense cannot replace evidence, and a proper application of *Tinker* in this case would have resulted in a finding of protected speech.

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[10] Notably, there is not one shred of evidence that Petitioners gave Euverard "lip" or made any "smart aleck" remark to him.

[11] In *TSSAA v. Brentwood Acad.*, the Court reached the "common sense conclusion" that hard sell tactics directed at "impressionable middle school athletes" "strikes nowhere near the heart of the First Amendment." 127 S. Ct. 2489, 2493 (2007). That is a far cry from *Tinker*, where a governmental actor must demonstrate evidence of "material and substantial disruption" in order to restrict student speech.

C. There is a conflict among the circuits on this issue.

In concluding that the Petitioners' speech falls outside the protection of the First Amendment, the Sixth Circuit relied heavily upon *Wildman*, discussed above. There, the Eighth Circuit held that a student could be punished for engaging in "insubordinate speech" that threatens "team unity" and "the cohesiveness of the team" even without proof of disruption. In *Wildman*, a female basketball player wrote a letter to other members of the team criticizing the head coach for not letting her play on the varsity. Although the letter included the word "bulishit," which would have justified restrictions under *Fraser*, the Eighth Circuit did not end its analysis there. The *Wildman* court found that the letter "constitute[d] insubordinate speech toward her coaches." 249 F.3d at 772. At the same time, the *Wildman* court impliedly acknowledged that "there was no specific evidence of a material disruption of a school activity." *Id.* at 771.

In contrast, the Second, Third, Ninth, and Tenth circuits have held that evidence of disruption is required. An illustrative case is *Seamons*, discussed above, in which the Tenth Circuit applied *Tinker* to a claim by a football player who was dismissed from the team. After the player said he was not going to apologize for reporting a hazing incident, the coach kicked the player off of the team. 84 F3d at 1237. Applying *Tinker*, the court found there was no evidence that the speech disrupted class work and rejected the school system's generalized "fear of a disturbance stemming from the disapproval associated with Brian's unpopular viewpoint regarding hazing in

the school's locker rooms." *Id.* at 1238. The Tenth Circuit held that such claimed fear was not sufficient under *Tinker* to "punish Brian's speech. . . ." *Id.*

The Second, Third, and Ninth Circuits have analyzed the issue similarly. *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006) (concluding that school censorship of images on student's T-shirt violated *Tinker* because the shirt did not cause any disruption), *Saxe*, 240 F.3d at 216-17 (concluding that school policy violated *Tinker* because it punishe[d] "not only speech that actually causes disruption, but also speech that merely intends to do so. . . "); *Pinard*, 467 F.3d at 768 (holding that, under *Tinker*, petition calling for resignation of coach and verbal complaints to administrative officials were protected because they did not disrupt school activities).

Because of this disagreement among the circuits and because the requirement of evidence is crucial to maintain the integrity of *Tinker*, the petition should be granted.

IV. The Petition Should Be Granted To Clarify That A Student's Right To Criticize An Abusive School Official Without Disruption Is Clearly Established

The petition should also be granted so that the Court can clarify that Petitioners right was clearly established. In *Tinker*, this Court expressly stated that a public school student's right to freedom of speech applies not only in the classroom but "in the cafeteria," "on the campus during authorized hours," and "on the playing field." 393 U.S. at 512-13. To determine

whether a constitutional right is clearly established, this Court has said that the contours of the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Saucier v. Katz*, 533 U.S. 194, 2002 (2001). This does not mean that the "very action in question has previously been held unlawful," and "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002). The only requirement is that, "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* at 739. Given this standard and the express language of *Tinker*, the District Court was correct in concluding that Petitioner's right to prepare, circulate, and sign the petition was clearly established on October 10, 2005.

CONCLUSION

For each of these reasons, Petitioners respectfully request that the Court grant the petition for a writ of certiorari. If this decision is allowed to stand, students will be reluctant to act as whistleblowers on any kind of wrongdoing by a coach or teacher – sexual abuse, physical abuse, or harassment – lest they be punished for doing so. The serious ramifications of the Sixth Circuit's decision call for review.[12]

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[12] Reports of sexual and physical abuse by teachers and coaches has been well-documented in news reports. *Speaking Up About Sexually Abusive Coaches*, ABC News, Oct. 15, 2004, http://abcnews.go.com/2020/News/Story?id+165510&page=1; *Coaches Who Prey*, The Seattle Times, Dec. 14-17, 2003, http://seattletimes.nwsource.com/news/local/coaches/. According to one survey of high school graduates, 17.7% of males and 82.2 % of females reported sexual harassment by teachers or staff during

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their school careers. Over 13% of those surveyed said they had engaged in sexual intercourse with a teacher. Wishnietsky, "Reported and Unreported Teacher-Student Harassment," Journal of Research, Vol. 3, 1991, pp. 164-69.